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No. 00-1494

Supreme Court, U.S.
FILED
APR 30 2001
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IN THE

Supreme Court of the United States

BALTIMORE RAVENS, INCORPORATED AND
NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,
Petitioners,

v.

FREDERICK E. BOUCHAT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

I. THE QUESTIONS PRESENTED ARE LEGAL IN NATURE AND GOVERN LIMITATIONS ON INFERENTIAL PROOF THAT CAN SUBSTITUTE FOR EVIDENCE OF ACCESS IN COPYRIGHT CASES

Despite Respondent's attempts to characterize the questions presented by the Fourth Circuit's majority decision as purely factual, the trial court's legal standard of factual sufficiency effectively abandoned the requirement of access. Respondent would ask this Court to turn a blind eye to the Fourth Circuit split panel's implicit and explicit elimination of the access element needed to prove copying. This construction of copyright law contravenes prior decisions of this Court and other courts of appeal.

The instant petition focuses on the access requirement of copyright law and whether it is legally appropriate to relax a copyright plaintiff's burden of proof by permitting a string of tenuous inferences to substitute for concrete evidence of access. This critical issue involves not only copyright jurisprudence, but extends as well to all civil trials. There is no clearer case for Supreme Court review.

A plaintiff's proof of access in a copyright infringement case itself constitutes inferential proof of copying—circumstantial, not direct, evidence that copying occurred. *Towler* v. *Sayles*, 76 F.3d 579, 581-82 (4th Cir. 1996). In assessing the evidence of access here and the district court's performance of its role as gatekeeper, the Fourth Circuit panel majority permitted the jury to entertain a speculative series of additional inferences.[1] (*See* Pet. App. 22a, 24a (King, C.J., dissenting).)

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[1] To find access by Petitioners to Respondent's drawing, the jury of necessity relied on a string of unsupported, contradicted inferences and from there presumed copying, once again by inferential extension.

Notwithstanding Respondent's claims to the contrary, (Resp. Br. at 9-16), the record before the Fourth Circuit contained the unimpeached, uncontradicted testimony of no access by Petitioners, as recognized by Circuit Judge King in his vigorous dissent. (Pet. App. 16a - 22a (King, C.J., dissenting).) The Court of Appeals panel majority never questioned or disputed the evidence demonstrating lack of access. Instead, as Respondent acknowledges, (Resp. Br. at 7), the Fourth Circuit reached its split decision in the face of that evidence. In an attempt to color as fact-based the review requested herein, Respondent mischaracterizes the record below by referring to "the jury's evaluation of facts and circumstances *proved* at trial." (*See* Resp. Br. at 6 (emphasis added).) There was no such proof.

Instead, the string of inferences that culminated in the ultimate inference of copying amounted to a mere gossamer thread: Respondent offered no proof, but only supposition as to what could have happened. If such supposition is accepted as proof, then copyright law's access requirement serves no meaningful function.

II. SHIFTING THE BURDEN OF PROVING ACCESS FROM PLAINTIFF TO DEFENDANT CONSTITUTES AN IMPERMISSIBLE END RUN AROUND ESTABLISHED PRINCIPLES OF COPYRIGHT LAW

The Court of Appeals panel majority, like the district court before it, purposely chose to discount Petitioners' evidence refuting access, (*see* Pet. App. 7a AI), in favor of layers of inferential proof that impermissibly operate to reallocate the burden of proof. While Respondent takes pains to note that the presumption of copying remains even after a copyright defendant's introduction of contrary evidence, (Resp. Br. at 8 (citing *Keeler Brass Co.* v. *Continental Brass Co.*, 862 F.2d 1063, 1065-66 (4th Cir. 1988))), Respondent fails to

acknowledge the significant, related holding that the ultimate burden of persuasion remains constant—and rests, always, with the plaintiff. *Keeler Brass*, 862 F.2d at 1066.

Respondent can not satisfy his burden of persuasion merely by argument against Petitioners' proof. He must provide affirmative evidence, which he has never done. Self-evidently, the implicit assumption of both Respondent and the Fourth Circuit panel majority that the jury's freedom to disregard Petitioners' denials of access can alone satisfy Respondent's heavy burden is erroneous, for if it does, then all cases will survive summary judgment. Mere credibility attacks,[2] without more, do not amount to *affirmative evidence* and do not carry sufficient legal weight to satisfy Respondent's burden of proving access. *See Bose Corp.* v. *Consumers Union of United States*, 466 U.S. 485, 512 (1984).

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[2] Respondent's Brief, like the case he presented at trial, consists of *nothing but* credibility attacks. However, (1) Respondent's questioning of the relationship between John Moag ("Moag") and David Modell ("Modell"), (Resp. Br. at 6), is immaterial, as their relationship did not—as it must, *see Towler*, 76 F.3d at 585—concern the matter at issue, logo development; (2) Respondent's persistent attempts to undercut the validity of Petitioners' independent creation, (Resp. Br. at 10-11), was addressed at trial, when the court specifically instructed the jury not to credit any suggestion that improper liberties had been taken by the design team; (3) despite Respondent's strained endeavor to link Moag and Modell, together, to Bouchat, (Resp. Br. at 11), Moag never forwarded design submissions to Modell "for political reasons" or otherwise, and the evidence plainly established that the brief photo session with Moag and Bouchat was conducted as a favor to Bouchat's employer, the Maryland Department of Labor, Licensing and Regulation, *not* Modell; (4) Respondent confuses his dates, (Resp. Br. at 12), in that David Cope implemented the Ravens' corporate policy of returning public submissions and not forwarding them to New York on March 18, 1996, whereas the first wave of cover letters accompanying the returned submissions was sent a few weeks later, on April 4, 1996; and (5) Respondent's dramatic characterizations of Petitioners' witnesses' testimony are but fanciful embellishments, illustrative of Respondent's desperate attempts to substitute credibility accusations for hard evidence.

Respondent's alleged prior creation of his drawing or the application of the "striking" similarity doctrine[3] to the proof of access cannot function as a burden-shifting device. They are not—and should not be transformed into—substitutes for the established legal requirement of access. First, a copyright plaintiff's prior creation[4] has absolutely no bearing on the critical, material question of what proof suffices to show access and thereby establish copying. Second, Circuit Judge King pointed out in dissent that the Fourth Circuit panel majority *implicitly* reduced the evidentiary showing necessary to demonstrate access, by endorsing extreme inferential proof in contravention of decisions of this Court and other courts of appeal. (*See* Pet. App. 16a & n.3 (King, C.J., dissenting).)

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[3] Respondent's suggestion, (Resp. Br. at 16), that Petitioners should be precluded from challenging the striking similarity doctrine is misplaced. During the charging conference, Petitioners objected to any jury instruction on striking similarity, precisely because it is a doctrine that should not have had *any* part in the trial at all. Similarly, Respondent's suggestion that Petitioners did not properly object to the coercive jury instructions at issue, (Resp. Br. at 16), is inaccurate: Petitioners voiced their objections to each of the coercive supplemental charges at the earliest available opportunity.

[4] Respondent erroneously claims that Petitioners made no mention of the witnesses who testified at trial as to Respondent's prior creation of his drawing. (Resp. Br. at 7 n.8.) Although irrelevant to the Petition on the basic issues and accordingly not necessary for Petitioners even to attempt to disprove, Petitioners nonetheless did address, and discount, Respondent's claimed evidence. (Pet. at 10.) What *Respondent* not surprisingly fails to mention in his drawing-as-Christmas-gift discussion, (Resp. Br. at 2-3), is that the witness in question had previously been convicted of a felony for fraudulent conduct, committed while a government employee. While there *were* witnesses who, testifying several years later, believed they could place some of Bouchat's many Ravens works prior to June, 1996, eyewitness testimony of this kind is considered inherently suspect for good reason. The Christmas-time tale spun by Respondent is but another illustration of the lengths to which Respondent's pattern of fabrication can run, if left unchecked. It highlights the importance of the judicial role as gatekeeper, shielding juries from like frivolous claims.

Third, the panel majority decision would likewise *explicitly* eliminate the access requirement *entirely* by application of the "striking" similarity standard. This questionable legal authority is the subject of vigorous debate among various courts of appeal, (*see* Pet. at 23-24), which should be resolved by this Court.

Adopting the much-debated doctrine of "striking" similarity, (*see* Pet. at 23-24), as well as crediting as relevant Respondent's "evidence" of prior creation, effectively shifts the burden of proving copying from the plaintiff to the defendant. No authority exists for so drastically upending copyright law.

III. SHIFTING THE BURDEN OF DISPROVING INDEPENDENT CREATION FROM PLAINTIFF TO DEFENDANT CONSTITUTES AN ABANDONMENT OF TRADITIONAL COPYRIGHT JURISPRUDENCE

Likewise, by the mere use of the label "striking" similarity, the split panel decision contravened established principles of copyright law by impermissibly reallocating the burden of proof as to independent creation. The burden always rests on Respondent, as the copyright holder, to show that there was no independent creation. *Keeler Brass*, 862 F.2d at 1066. In sum, Respondent's submission does not—and can not—meet the challenge to the defects in the Fourth Circuit panel majority's application of copyright law.

CONCLUSION

This case presents compelling legal questions regarding a conflict among the circuits over the standards to be applied in copyright cases, the use of unsupported inferences in all trials, and the impermissible shifting of the burden of proof on fundamental copyright issues. For the reasons set forth in the Petition and in this Reply Memorandum, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 30, 2001